(16)

No. 91-122

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

Petitioner,

vs.

RENE ALBERTO RODRIGUEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE MUNICIPAL ART SOCIETY OF NEW YORK, INC., *AMICUS CURIAE*, IN SUPPORT OF AFFIRMANCE

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The Municipal Art Society of New York, Inc. (the "Society"), amicus Curiae, submits that two other questions are subsumed by the question presented. They have not been answered by the Court in the context of land use regulation.

THE SUBSUMED QUESTIONS

When there has been an "arbitrary, capricious or illegal" denial of permission that is required by valid legislation for a particular use of land and the denial is not the result of animus or a violation of another constitutional protection, is the landowner

(1) "deprived" as a matter of substantive due process

(2) of "property" within the meaning of the Fourteenth Amendment so that the owner has a claim under 42 U.S.C. § 1983?

THE INTEREST OF THE SOCIETY

The Society is a New York not-for-profit corporation founded in 1892. It has a real and substantial interest in the outcome of this case and in the outcome of No. 91-453, October Term, 1991, Lucas v. South Carolina Coastal

Commission, which also presents important questions concerning land use regulation. The objective of the Society is "to work towards the creation of a livable city . . . and, particularly, to use the Municipal Arts of Architecture, Landscape Architecture, Planning, Preservation and Public Art to improve and protect the physical environment of New York." As a particular example, there are more than 500 miles of riverine, estuarine and ocean waterfront within the city; the City Planning Commission is studying a comprehensive plan for the use of its waterfront that will be consistent with federal and state coastal zone management statutes.

SUMMARY OF ARGUMENT

The allegedly "arbitrary, capricious or illegal" denial of a construction permit did not, within the

meaning of the Fourteenth Amendment, "deprive" petitioner of its "property."

To conclude otherwise would make the federal courts the tribunals of review of particular land use decisions, would do violence to the federal structure of the Constitution by involving the federal courts in an area of particular state interest and would severely impair the capacity of the federal courts to administer justice in the controversies actually entrusted to them.

ARGUMENT

THE DENIAL OF THE DISCRETIONARY PERMIT DID NOT "DEPRIVE" THE PETITIONER OF ITS "PROPERTY".

A. The Meaning of "Deprive"

Loss of an economic benefit caused by an official act is not ipso facto a "deprivation" of "property." Daniels v. Williams, 474 U.S. 327, 328 (1986). To hold otherwise "would trivialize the

centuries-old principle of due process of law." Id. at 332. The Constitution "deals with large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liabilities for injury that attend living together in society." Id.; see also, Davidson v. Cannon, 474 U.S. 344 (1986).

Here, the claim of official misconduct is the denial of an application for permission to construct a major development project. The misconduct is claimed to be both "deliberate" -- in the sense that the agency and its officials are assumed to have known what they were doing or failing to do -- and, thus, as the question is presented by petitioner, "arbitrary, capricious or illegal." No claim is made of animus or violation of

any other constitutional protection. Cf., Daniels, 474 U.S. at 330.

"[B]ut we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.'" Id. at 330 (quoting Parratt v. Taylor, 451 U.S. 527, 548-549 (1981) (Powell, J., concurring)). While the circumstances of the precedents for this proposition have not been a land use regulatory agency's treatment of a land use permit application, (see id. at 330-333), such a case is particularly appropriate for distinction between constitutional causes and state judicial review of administrative agency decisions. "Section 1983, upon which plaintiffs depend, does not guarantee a person the right to bring a federal suit for denial of due process in every proceeding in which he is denied a license or a permit. . . . A federal court 'should not . . . sit as a zoning

board of appeals.'" Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 58 (2nd Cir. 1985) (quoting Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)).

Two assumptions underlie petitioner's claim: the Due Process Clause "was intended to secure the individual from the arbitrary exercise of the powers of government," Daniels, 474 U.S. at 331 (citations omitted), and "arbitrary exercise" of governmental powers involves a concept of substantive due process, as distinguished from procedural due process. The facile characterizations of a land use decision as "arbitrary, capricious or illegal," however, merely state the common and necessary bases for judicial review of the administrative agency decision. See, e.g., Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1991); P.R. Laws Ann. tit. 23, § 743 (1988).

That these characterizations bring into play such review mechanisms does not, absent particularization of animus or violation of another constitutional protection, make the agency action also a deprivation of due process within the meaning of the Fourteenth Amendment. Rather, as with "traditional tort law," Daniels, 474 U.S. at 333, the mechanisms for judicial review of administrative decisions suffice, ordinarily at least, to obviate the occasion for appeal to the constitutional due process protection.[1] As Chief Justice Marshall stated, "we must never forget that it is a constitution we are expounding," McCulloch v. Maryland, 4 Wheat. 316, 407

[1] In Daniels, 474 U.S. at 333 n. 2, and Davidson, 474 U.S. at 346, the claimant had no alternative remedy. Here, petitioner was able to seek review in the commonwealth superior and supreme courts. That petitioner was unsuccessful speaks more to the lack of merit to its grievance than to the existence of any constitutional claim.

(1819), and accordingly the Court should reject rules of law which "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." Paul v. Davis, 424 U.S. 693, 701 (1976).

B. The Meaning of "Property"

Petitioner cites in its petition cases which stand for the principle that a property interest can be found in the expectation of receiving a ministerial permit, (Pet. 13-14), and asserts that respondents' permit issuing functions are "ministerial in nature." (Pet. 4) But it is difficult to accept that an agency charged with reviewing and approving or disapproving plans for construction of thousands of hotel and residential units in an environmentally sensitive area was performing a "ministerial" function.

Assuming for the sake of argument, however, that the assertion is accurate, it would show only that during the decade that the project languished petitioner could have sought the commonwealth equivalent of a writ of mandamus. It says nothing itself as to whether petitioner had a "property" right to the necessary construction permit. That a basis for mandatory relief to obtain an expected benefit exists is not itself an interest in real property created and defined by the state. Cf., Preseault v. Interstate Commerce Commission, 494 U.S. 1 (1990); Yale Auto Parts, 758 F.2d at 58.

The court of appeals, while thinking it "far from clear" whether petitioner's expectation of receiving a construction permit "constituted a property interest under Puerto Rican law" was willing so to assume. PFZ Properties, Inc. v. Rodriguez, 928 F.2d

28, 30-31 (1st Cir. 1991). The size and evident complexity of the project, as well as the process by which it would be considered for approval, convincingly demonstrate that the permission sought was a discretionary approval. And no precedent was cited by petitioner (Pet. 13-14) that supports the proposition that there is a property right in the expectation of receiving a discretionary permit.

For purposes of the procedural due process guaranteed by the Fourteenth Amendment, "property" may encompass some claims to economic benefit in such areas as public employment and welfare benefits that arise from state-established relationships of contract or regulation. But it is quite another matter to contend that the economic benefit expected from the grant of permission, required by a valid exercise of the police power, to make a

particular use of land, particularly if the decision to grant or deny the permission is discretionary, is "property" for purposes of substantive due process.

The expectation of an economic benefit from a favorable discretionary decision concerning a particular use of land is only that; it is not a "legitimate claim of entitlement." See, Board of Regents v. Roth, 408 U.S. 574, 577 (1972). This proper distinction was drawn in the context of land use regulation in Dean Tarry Corporation v. Friedlander, 826 F.2d 210 (2d Cir. 1987) and RRI Realty Corp. v. Village of Southampton, 870 F.2d 911 (1989), cert. denied 493 U.S. 893 (1990).

The gamut of points of regulatory decision from conceptual approval through preliminary and site plan approvals to construction permit to certificate of occupancy is such that

state courts are best able to judge when the process is sufficiently ripe to justify mandatory relief in a proper case, taking into account available "reasonable and prudent" alternatives.

C. Federalism and Judicial Economy

The regulation of the use of land, as well as the creation and definition of real property interests, is particularly a function of state law. This has been recognized by the Court in its general deference to state and local governments regarding land use regulation: "Implicit in this deference is the recognition that land-use regulation generally affects a broad spectrum of persons and social interest, and that local political bodies are better able than federal courts to assess the benefits and burdens of such legislation." Rogin v. Bensalem Township, 616 F.2d 680, 698 (3rd Cir.

1980), cert. denied 450 U.S. 1029 (1981).

Similarly, federal courts have given deference to state and local governments in assessing individual land use decisions, particularly where there is any element of policy-related discretion, for reasons both of federalism and of judicial economy. Otherwise, "every allegedly arbitrary denial by a town or city of a local license or permit would become a federal case, swelling our already overburdened federal court system beyond capacity." Yale Auto Parts, 758 F.2d at 58. "To permit an influx of such cases into federal courts would violate principles of federalism, promote forum-shopping, and lead to unnecessary state-federal conflict with respect to governing principles in an area principally of state concern." Id. at 59. This deference is not restricted to land use,

but applies with equal force in other areas of particular and traditional state concern such as tort law. See, e.g., Daniels, 474 U.S. at 332; Paul v. Davis, 424 U.S. 693, 701 (1976); cf. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).

The limited powers of the national legislature and judiciary under the Constitution reflect its principle of federalism. While the protections for the individual provided in the Constitution are predominant, the proponent of intervention under the Fourteenth Amendment by the national government in state land use decisions that are not the result of animus or a deprivation of another constitutional protection should have a heavy burden of persuasion. If the basis for such intervention is at most uncertain, the principles of judicial economy and of

the due administration of justice in controversies where the federal role is plain, militate against imposing such a heavy burden on the federal courts. "To accept [petitioner's] argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. . . . We do not think the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society." Parratt, 451 U.S. at 544.

Finally, the effect on the administration of land use regulation by a decision for petitioner in this case

would be to chill local land use decision-making. Local planning boards are largely comprised of lay, volunteer members. To expose them to damage actions by disgruntled developers would drastically restrict their ability to exercise their discretion for reasons wholly unrelated to the proper application of the Constitution.

CONCLUSION

For the foregoing reasons and the reasons submitted by the respondent and the other amici, the judgment of the Court of Appeals for the First Circuit should be affirmed.

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January 1992

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